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In the Supreme Court of the United States

OCTOBER TERM, 1960

NICHOLAS A. STIRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals dismissing the appeal for want of jurisdiction (Pet. 11; R. 37) is not reported. The opinion of the district court (Pet. 13–14; R. 9–11) is not reported.

JURISDICTION

The order of the court of appeals was entered January 23, 1961 (R. 37). The petition for a writ of certiorari was filed February 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the denial of a motion to discharge a defendant, based upon a claim that the indictment was

amended and was therefore a nullity, is appealable before trial.

STATUTE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT

On January 11, 1960, this Court reversed the decision of the court of appeals in *Stirone* v. *United States*, and remanded the cause to the United States District Court for the Western District of Pennsylvania for proceedings in conformity with this Court's opinion (R. 2; Pet. 12; 361 U.S. 212). On March 16, 1960, petitioner filed a motion to dismiss the indictment, based, in part, on the ground that since this Court had reversed the judgment of the court of appeals, "the case is terminated" (R. 3, 8).

The district judge denied the motion on September 29, 1960 (R. 12; Pet. 15). The Court filed a memorandum opinion pointing out that this Court had agreed that the evidence at the original trial was sufficient to support a conviction for the crime charged in the indictment; that it had reversed the original conviction only because the case had been submitted to the jury with an alternative instruction which would

have permitted conviction on a theory not charged in the indictment; and accordingly that it had not directed dismissal of the indictment, but merely remanded the case for further proceedings (R. 9–11; Pet. 13–14).

On October 10, 1960, petitioner filed another motion—"for discharge of defendant and release of his bail" (R. 13; Pet. 10). He alleged that the indictment had been "amended" and that, since no new indictment was returned, the old indictment was a nullity (R. 13). On December 29, 1960, the district judge denied the motion, stating that the grounds for relief alleged had been previously considered in its memorandum of September 29, 1960 (R. 14; Pet. 16).

On January 5, 1961, petitioner filed a notice of appeal from the order of December 29 (R. 15). The government moved to docket and dismiss the appeal on the ground that the order was not a final decision of the district court under 28 U.S.C. 1291, and therefore the court of appeals had no judisdiction (R. 1–15). On January 23, 1961, the court of appeals ordered the case docketed and the appeal dismissed for want of jurisdiction (R. 37; Pet. 11).

ARGUMENT

The court below properly dismissed the appeal from the denial of petitioner's pretrial motion for

discharge.[1] Merely labeling the motion as one for "discharge" does not make it anything other than a motion to dismiss the indictment, which is interlocutory and not appealable. Objection to the ruling can be preserved and reviewed upon appeal from the final conviction, if any. The motion is not independent of the main case, cf. *Stack* v. *Boyle*, 342 U.S. 1, but is one where review will halt the orderly progress of the cause. *Cobbledick* v. *United States*, 309 U.S. 323, 327. Consequently the ruling on this motion is not a "final decision" within 28 U.S.C. 1291, and the appeal was properly dismissed for want of jurisdiction.

Petitioner' reliance on *United States* v. *Sineiro*, 190 F. 2d 397 (C.A. 3), is inapposite (Pet. 6-7). Aside from the fact that it is a prior decision of the same circuit, *Sineiro* involved a proceeding brought prior to indictment and thus independent of the main proceeding. *Parlman* v. *United States*, 247 247 U.S. 7; *Go-Bart Co.* v. *United States*, 282 U.S.

[1] The theory of the motion is that this Court decided in *Stirone* v. *United States*, 361 U.S. 212, that the indictment had been "amended" (Pet. 5). That theory is without substance. This Court decided that the erroneous admission of evidence and the charge to the jury created a possibility that petitioner might have been convicted on a charge not found by a grand jury—*i.e.*, that there was a variance between the indictment and the charge to the jury. That ruling does not preclude retrial on the charge actually returned. The pending indictment has not been amended and is in the exact form as returned by the grand jury. Cf. *Ex Parte Bain*, 121 U.S. 1. That is the charge to be tried.

344, 356. Petitioner's motion is after indictment and clearly in the main criminal case.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[2] The practice of reformulating a motion upon which the court has previously ruled is clearly in violation of the spirit of Rule 12(b), F.R. Crim. P. By this tactic petitioner obtained a second order and, in effect, illegally extended his time to appeal. That is a further ground for dismissal for want of jurisdiction.

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